REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 480 OF 2010

IN THE MATTER OF THE ESTATE OF DAVID KEYA (DECEASED)

JUDGMENT

1. According to the certificate of death on record, serial number 354977, dated 1st September 2009, the deceased herein, David Keya, died on 27th July 2009. The letter from the Chief of Chekalini Location, dated 22nd February 2010, does not disclose the survivors of the deceased, but discloses that the deceased died possessed of Kakamega/Chekalini/557. Representation to the estate of the deceased was sought in a petition filed herein on 22nd July 2010, by Mary Marimba and Lazarus Keya, in their purported capacity as widow and son, respectively, of the deceased. They expressed the deceased to have been survived by the two of them, and by Wycliffe Keya, another son. He was also expressed to have died possessed of Kakamega/Chekalini/557. Representation to the intestate estate was granted to the two, Mary Marimba and Lazarus Keya, on 13th September 2010, and a grant was issued, dated 29th September 2010.

2. A summons for revocation of grant, dated 30th May 2013, was filed herein on 30th May 2013, by individuals who claimed that the administrators had obtained representation to the estate without involving them. They explained that the deceased died a polygamist, having married 3 wives, with whom he had 10 children, being 7 sons and 3 daughters. They also said that apart from Kakamega/Chekalini/557, the deceased also owned South Maragoli/Lugovo/1061. They also argued that Wycliffe Keya was not a child of the deceased, for the deceased did not have any children with Mary Marimba. It was also alleged that the wills the administrators were relying on were forged.

3. The summons dated 30th May 2013 was marked as abandoned, on 1st October 2013, and the administrators, appointed in the grant of 13th September 2010, were directed to file for confirmation of their grant.

4. The directions of 1st October 2013 were complied with, for a summons for confirmation grant was duly filed on 12th February 2014, dated 13th February 2014. The deceased was said to have been survived by a widow, 4 daughters and 4 sons, being Mary Marimba Keya, Anna Vugutsa, Wycliffe Keya, Margaret Mideva, Lazarus Chabuga Keya, Mary Olesia, Eric Muyeyia Keya, Rachael Mmboga Keya and Noah Mukangula Keya. It was proposed that Kakamega/Chekalini/557 be devolved upon Mary Marimba Keya, to hold on her own behalf and that of Anna Vugutsa, Wycliife Keya, Margaret Mideva, Lazarus Chabuga Keya and Mary Olesia.

5. An affidavit of protest was lodged in the matter by Eric Muyeyia Keya on 3rd April 2014, sworn on even date. He averred that the applicant had not disclosed the rightful beneficiaries of the estate of the deceased. He identified them as Eric Muyeyia Keya, Fred Mumera Keya, William Wesley Keya, Noah Mukangula Keya, Rachael Mmboga Keya, Phanice Keya, Peninah Keya, Lazarus Chabuga Keya, the late Alex Chabuga Keya, the late Ibrahim Asiri Keya, Grace Vinaywa Keya w/o of the late Alex Chabuga Keya, Mary Marimba, Azibeta Keya and Mary Olesia. He avers that Mary Marimba did not have any children with the deceased, and her children, Anna Vugutsa, Wycliffe Keya and Margaret Mideva, were not dependants of the deceased, who had their own father, who had brought them up. He was said to have had 4 parcels of land, being Kakamega/Chekalini/557, South Maragoli/Lugovo/1061, Plot No. 4 Bukuga Market sold to Livingstone Imbamba and plot at Kipkaren at Mavanga. He proposes that Kakamega/Chekalini/557 be shared court equally between Eric Muyeyia Keya, Fred Mumera Keya, William Wesley Keya, Noah Mukangula Keya, Rachael Mmboga Keya, Phanice Keya, Peninah Keya, Lazarus Chabuga Keya, Grace Vinaywa Keya, Mary Marimba, Azibeta Keya and Mary Olesia. It is proposed that South Maragoli/Lugovo/1061 be devolved upon Eric Muyeyia Keya, Fred Mumera Keya, William Wesley Keya, Noah Mukangula Keya, Rachael Mmboga Keya, Phanice Keya, Peninah Keya and Grace Vinaywa Keya. plot at Kipkaren at Mavanga is devolved upon Mary Marimba Keya. It is stated that Anna Vugutsa, Wycliffe Keya and Margaret Mideva ought not get anything from the estate, on grounds that they were neither children nor dependants of the deceased, for they had their own father, whose assets they were entitled to. It is averred that South Maragoli/Lugovo/1061 had been charged as security with a bank. It is stated that the alleged wills were forged, and the distribution proposed in the wills were unequal and unproportioned.

6. What I am called upon to determine is a summons for confirmation of grant, dated 21st September 2016, filed herein on 28th October 2016. It is brought at the instance of the administrators. It is founded on an affidavit that the administrator swore on 21st September 2016. The persons listed as survivors are the same as those set out in the listed in the petition and in the letter by the Assistant Chief that I have referred to above, and the assets proposed for distribution are the same as those set out in the petition and the Chief's letter.

7. Directions were given on 8th April 2014, for the confirmation application to be disposed of *viva voce*. When the matter came up for hearing on 10th March 2016, the parties entered into a consent, to the effect that the grant made on 13th September 2010, to Mary Marimba Keya and Lazarus Keya, be revoked, and a fresh one be made to Mary Marimba Keya, Lazarus Chabuga Keya and Eric Muyeyia Keya. They also agreed on the filing of affidavits on distribution.

8. A summons was filed on 4th November 2016, dated 3rd November 2016, seeking variation and setting aside of the of the consent orders of 10th March 2016. It also sought that a grant of probate be made based on the written will of the deceased dated 17th October 1989. The application is at the instance of Mary Marimba Keya and Lazarus Chabuga Keya. They aver that the deceased died testate, having made a written will on 10th March 2016. It is stated that there was an error apparent on the face of the record, in the order of the court of 10th March 2016. A copy of the alleged will is attached to the affidavit. There is a reply to that application, vide an affidavit, sworn and filed herein by Eric Muyeyia Keya, who avers that the said will was not valid, for the deceased did not make any will on 17th October 1989 as alleged. He also avers that there was another alleged will, allegedly made on 18th August 1984, which had not attesting witnesses. A copy of the alleged will of 1984 is attached.

9. Mary Marimba Keya and Lazarus Chabuga Keya followed up the application with filing, on 15th November 2016, a mode of distribution, where they proposed that Kakamega/Chekalini/557 be shared out in conformity with the will of the deceased, so that Mary Marimba Keya, Ann Vuguza Keya, Wycliffe Omunga Keya and Margaret Mideva Keya get 3.125 acres each; while Lazarus Chabuga Keya, Asibeter Kusui Keya, Mary K. Olesia Keya, Lydia Kadenyi Keya and Teresa Imali Keya take 2.5 acres each. It is further proposed that South Maragoli/Lugovo/1061 be shared amongst members of the family at Maragoli, including Eric Muyeyia Keya.

10. Directions were given on 8th November 2016, that the issues raised in the said application be canvassed and determined simultaneously with the confirmation application.

11. The oral hearing happened 18th September 2017, with Eric Muyeyia Keya, the protestor, on the witness stand. He testified that the deceased had married 3 times. He named the wives as Emmy, Aliveta and Mary. He described his mother as the first wife. He said that the deceased died possessed of the assets listed in the papers. He operated a shop and bar at Majengo. He said he got to know Mary well when she married the deceased, although he had met her earlier in the 1960s when she worked at the bar of the deceased. He stated that his mother lived with the deceased at South Maragoli/Lugovo/1061, and at other times at Kakamega/Chekalini/557, where the other 2 wives had been settled. He explained that his mother was sickly, and that she went to live on Kakamega/Chekalini/557 because the weather there was more palatable. He stated that Mary Marimba was previously married to Esere Agesa, before she married the deceased. He said that the said man was still alive as at the date he was giving evidence, and lived in Central Maragoli Location, and that he had had children with him. He said that Mary Marimba did not have any children with the deceased. he said that Kakamega/Chekalini/557 was acquired in 1965, by which time he and his siblings were students. During school holidays they would go and spend time with him. He proposed that Kakamega/Chekalini/557 be shared out equally amongst the children of the deceased and 2 surviving widows, so that each get 2.63 acres. He stated that Plot No. 4 Bukuga had been sold by the deceased, to Livingstone Imbamba, and that the same ought to be given to him. He proposed that South Maragoli/Lugovo/1061 be given to the children of Emmy, who included himself. He also said the deceased had a plot at Mabanga, whose number he could not recall, and he proposed that the same be given to his mother Emmy. He asserted that Mary Marimba did not assist the deceased clear the loan on Kakamega/Chekalini/557, saying that the same was solely cleared by the deceased, with a loan from the National Bank of Kenya, and proceedings from the sale of the plot at Bukuga. He explained that he used South Maragoli/Lugovo/1061 as collateral for the National Bank of Kenya loan. He stated that he was unaware that Mary Marimba had initiated these succession proceedings, until when one of his siblings sought to put up a house on Kakamega/Chekalini/557, and were summoned to the office of the District Officer. On the will of 18th August 1984, he said that the same was not signed by attesting witnesses. He also said that the document was not in the hand of the deceased, and the signature on it was equally not his. Regarding the will of 17th October 1989, he said that it was not dated on the first page, and that it provoked previous wills. He said that it disposed of a property described as Chekalini/Busembe/557, yet the deceased had no such property. He stated that the alleged signature of the testator was not witness, and in any event that signature was not of the deceased. he also said that the signatures in both wills alleged to be of the testator were different. He said that all the assets of the estate were not listed in the petition, neither were all the beneficiaries mentioned. He said that the only child the deceased had with Mary was Lazarus Chabuga, and therefore the rest were not entitled to a share in the estate, for they were children of her previous husband, to whom they ought to look for provision. He said that the Maragoli land was small, and a distribution that would see Mary take Kakamega/Chekalini/557 while they take the Maragoli land would be disproportionate.

12. During cross-examination, he stated that his mother Emmy was the first wife, followed by Azibeta the mother of Lazarus. He said that the deceased had 11 children, and not 13. He stated that he was 26 years old in 1975 when Mary was married. The deceased settled her on Kakamega/Chekalini/557. He explained that his mother was in Maragoli, while Azibeta was on Kakamega/Chekalini/557. He stated that the deceased was buried on Kakamega/Chekalini/557, after staying at the house of Mary at Kakamega/Chekalini/557. He said that Wycliffe and Mary were aged between 10 and 12 when they came with their mother. The deceased took care of them as their guardian. They schooled under the care of the deceased, for when a parent was required at school, he used to go to their school. He said he would refer to them traditionally as his siblings. He said that they used the Keya name at school, while the deceased used to buy clothes and food for them. He never chased them away, and they attended his burial. He asserted that the Bukuga plot had been sold. He conceded that Mary had been married in church by the deceased. He said that the loan on South Maragoli/Lugovo/1061 was taken in 1980, but he had no evidence to show that the loan funds were utilized to clear the loan on Kakamega/Chekalini/557. He also conceded that both the deceased and Mary cleared the loan on Kakamega/Chekalini/557. He said that he himself did not participate in the settling the debt on Kakamega/Chekalini/557, neither did his siblings, but asserted that did not preclude them from inheriting the property. He said that they had not cleared the loan on South Maragoli/Lugovo/1061. On the Mabanga plot, he said that he did not know where it was, and he had no documents relating to it. He asserted that South Maragoli/Lugovo/1061 was small, and that was why he was proposing that it be given exclusively to his mother's children. He said that Azibeta had 3 children, and he did not propose that they get a share of South Maragoli/Lugovo/1061. He also explained that he did not include Anna, Margaret and Wycliffe in his proposals because they had their own father. He said that he did not dispute that the deceased took care of them. He insisted that their mother ought to produce an adoption certificate. He said that Wycliffe obtained an identity card using the Kya surname, even though he could not say whether the deceased, who was alive then, had consented to it. He said that Wycliffe was married and lived on Kakamega/Chekalini/557 with his family. On the will of 1984, he stated that the same was not in the handwriting of the deceased, although he had not availed nay documents by the deceased for comparison purposes. He said that he did not know that the deceased had land elsewhere within Chekalini besides Kakamega/Chekalini/557. He said that Busembe was a village neighboring Chekalini.

He said that although he was not a handwriting expert, the signature on the will of 1989 was not that of the deceased. he said that the will of 1989 was signed by only one attesting witness. He said that the deceased had not subdivided his land before he died, between the 2 families. He said that South Maragoli/Lugovo/1061 was apportioned by the deceased amongst his children from the first wife, and they utilized it along those lines. He clarified that the 2nd and 3rd wives resided in Kakamega/Chekalini/557.

13. The case for the applicant opened on 13th February 2020, with Lazarus Chabuga on the witness stand. He testified that the deceased had 3 wives, being Emmy Azibeta and Mary. He said that he was from the house of Azibeta. He said that before he died, the deceased had written a will, in which he had proposed that 1st and 2nd houses get the property in Maragoli, while the younger family was to get the land at Lugari. He produced the 2 wills, the handwritten one of 1984 and the typed will of 1989. He stated that the loan for the Lugari property was paid for from the proceeds from the farm at Lugari, and that the1st house was not involved in repaying the loan, and that it was the 2nd and 3rd houses that repaid the same. He produced some receipts as evidence that they were the ones who repaid the loans. He said that the property in Maragoli was for the 1st house, and that he was not interested in South Maragoli/Lugovo/1061, and asserted that the deceased had no plot at Mabanga Market. During cross-examination, he conceded that it was the deceased who sold the Bukuga plot. He also stated that the Lugari land was agricultural, and the deceased paid for it from farm proceeds. He said that he knew the names of all his siblings from all the houses. He conceded that not all the children of the deceased had been listed in the petition. He said that the ones he listed were the ones he knew, save for Noah Mukongole Keah. He said that Noah Mukongole was not introduced to them as a child of the deceased. He said that the two wills only mentioned him and Mary, and none of the children of the deceased were to benefit from the estate except himself. He also conceded that he had sisters from 3 of the houses, and that none of them were mentioned in the petition. He also conceded that the children from the 1st house were not listed in the petition, and that he had not included the Maragoli plots in the petition. He said that Azibeta was not mentioned in the will. He said that his proposed mode of distribution was in line with the will of the deceased. He conceded that according to the will, he was entitled to 50% of the estate. He conceded that Mary came into the life of the deceased with some children, and said that he did not know their names.

14. Mary Marimba Keya followed. She said that the deceased used to pay school fees for his children. She conceded that she was previously married to another man before she married the deceased, and that she had 3 children from that previous marriage. She said that their mother was not Onzere, and that she did not know who their father was. She said that she was in charge of the deceased's businesses. She asserted that the first wife had nothing to do with Lugari, for she was based at Maragoli, where she bore her children. She said that she had not met the children of the 1st wife until she saw them at the burial of the deceased, and that she did not know the 1st wife well until she attended her funeral. She said that she knew Azibeta as she lived with her at Lugari. She said that Azibeta never married the deceased. She said that she wedded the deceased in a church ceremony, and she knew then that he was married to another woman, although they were separated. He said that Azibeta left the deceased and went to work in Nairobi, and then went to where she had been previously married at Kisii, and when her Kisii husband died, the deceased took her back. She asserted that the deceased had shared out his property before he died. She said that Azibeta had 4 children, and that she, the witness, was the one living with them.

16. Jamen Majani Ongondi testified next. He was not related to the deceased, but taught his children. He said that the deceased had educated his children, and fed and clothed them. He had the boys circumcised, and collected the dowry for the girls. He testified that the deceased had 3 wives, the 1st wife lived at Maragoli, while the other 2 were at Lugari. He said that the deceased did for his children everything that a parent does for their children. He had no debts in school, and did not discriminate against any of his children. He said that one of his sisters was married to a brother of the deceased. he said that he knew Mary Marimba before she married the deceased. He said that she had previously been married to Esere. He said that he did not know whether some of her children had been sired by Esere. He confirmed that she used to work at the businesses that the deceased ran at Majengo. He said that he did not know of any of the activities of the other wives in Lugari. He said that all he knew was about the children of the deceased. He said that the deceased had 3 wives, but was separated from his 2nd wife. He said that the children that he taught were of Mary Marimba, and they had all been born by 1981. He described their father as the deceased.

16. At the close of the oral hearings, both sides put in their respective written submissions. I have read through them, and noted the arguments made.

17. What is for determination is a summons for confirmation of grant. In confirmation applications, there are two principal factors for the court to consider: appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

> "Confirmation of Grants
>
> 71. Confirmation of grants
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> (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
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> (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—
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> (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
>
> (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares."

14. I will start with the first issue, appointment of administrators. It is a contested issue, in the sense that one side argues that the deceased died testate, and, therefore, probate ought to be granted of the said will, which would mean that the grant of letters of administration intestate made by conset on 10th March 2016, ought not be confirmed, or, put differently, the administrators appointed by that order ought not be confirmed, instead the court should make a grant of probate as per the will alleged, and the executors named in that will be confirmed instead.

15. That ought to lead me to the first question, which should ideally address all the other issues, whether the deceased made a valid or valid wills, and whether, therefore, he died testate? The applicants have placed on record two documents which they purport to be the wills of the deceased. The first is a handwritten one, dated 18th August 1984, which I shall refer to as the 1984 will; and the second is a typewritten document dated 17th October 1989, which I shall refer to as the 1989 will. The 1984 will bears a signature purported to be that of David Keya Embodo, which is the only signature on the document. The 1989 will bears the signature of the testator, David Keya, and that of a Japheth Mahasi.

16. Are these 2 documents valid wills of the deceased? To answer that question, I will have to look at the law on the matter. The deceased died in 2009, after the Law of Succession Act had come into force in 1981. The validity of wills made after 1st July 1981 is determined on the basis of section 11 of the Law of Succession Act, which provides as follows:

"11. No written will shall be valid unless-

(a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

17. The validity of a written will is dependent on whether it is properly signed by the maker or the testator, and whether it is properly attested by two competent and independent witnesses. So, were the two wills executed by the testator, or the deceased in this case? Both wills bear a signature that is purported to be that of the deceased. If the signatures in both are those of the deceased, then it can quite safely be concluded that the 2 wills were executed by the deceased in compliance with section 11 of the Law of Succession Act. See *In re Estate of Lucy Wangui Muraguri* [2015] eKLR (Musyoka J).

18. The signatures are, however, disputed. The protestor says that they are not the signatures of the deceased. He led no evidence whatsoever to support that contention. He did not place any document before the court to demonstrate that the handwriting on the 1984 will was not that of the deceased, nor signatures for comparison to show that the signatures in the wills of 1984 and 1989 were not made by the deceased. The court claims no expertise in handwriting or document examination. The protestor did not claim any, and did not provide any proof that he had any such expertise. Where a handwriting is disputed, the best way of impeaching the same would be by way of getting expertise evidence. That is the basic minimum. The protestor ought to have had the handwriting in the will of 1984 and the signatures in both wills subjected to forensics. It is with such evidence that the court would evaluate whether those signatures were genuine. It was not enough for the protestor to merely allege that that handwriting and those signatures were not of the deceased. Similarly, when the applicants raised the issue of the wills, the protestor made it very clear that no valid will existed. That should have caused the applicants, who sought to propound those wills, to obtain evidence, by way of document examination, to the effect that the same were in fact signed by the deceased himself. The mantra is that he who alleges must prove. The applicants allege that the documents they rely on were signed by the deceased, and, therefore, they incurred an obligation to establish that that was so, by getting evidence to support that, especially because the protestor had dismissed the signatures, and, secondly, because the applicants had initially initiated the cause in intestacy, they are now, midstream, saying that the deceased died testate, and they ask that their grant of letters of administration intestate be converted to a grant of probate, based on those impugned wills. They have an obligation to go the extra mile, and establish that indeed the hand that signed the documents was that of the deceased.

19. As stated above, I claim no expertise in document or handwriting examination. I have looked at both wills, that dated 1984 and that dated 1989, and compared the signatures on both. It is purported that they were signed by the same hand, 5 years apart. To my untrained naked eye, I am persuaded that the 2 signatures are not similar. To my mind they cannot have been signed by the same hand. I concede that it is possible a person could have several signatures, or different ways of signing. Given the very obvious dissimilarities between the signatures appearing in the 2 documents, it behooved the applicants to get document examiners to compare the said signatures with known signatures, and to place a report on record for consumption by the court, so that the court could evaluate the same one way or the other. The fact that the signatures

are dissimilar, despite allegedly being made by the same hand in a space of 5 years should raise eyebrows, and create doubt as to the authenticity of the said signatures. I entertain serious doubts as to whether the signatures on the 2 documents were made by the deceased.

20. I am aware that expert evidence on documents and handwriting is secondary evidence. It is opinion evidence which is not binding on the court, as per *Elizabeth Kamene Ndolo vs. George Matata Ndolo* [1996] eKLR (Gicheru, Omolo and Tunoi JJA), where it was said that eyewitness evidence is preferable to expert evidence. What that means is that anyone seeking to demonstrate that a signature was genuine and not forged needs to adduce evidence from witnesses who were present when the alleged signature was being made, who can attest to the fact that they saw the testator sign the will. The applicants did not lead any evidence from anyone who claimed to have been present when the wills of 1984 and 1989 were allegedly signed by the deceased. No one saw him sign, or, at least, no one was presented before me who could assert that the signatures on the 2 documents were made by the deceased because he was present at the execution of the wills and he saw the deceased affix those signatures on the documents. See also *In re Estate of the Late Samson Kipketer Chemirmir (Deceased)* [2019] eKLR (Ndung'u J), *Iskorostinskaya Svetlana & another vs. Gladys Naserian Kaiyoni* [2019] eKLR (W. Korir J) and *In re Estate of Augustine Muita Kahare (Deceased)* [2019] eKLR (Musyoka J).

21. On attesting witnesses, the law requires that the testator ought to sign the will in the presence of 2 or more competent and independent witnesses, who must be able to see him sign it. The objective is that in the event of the execution of the will being contested, the attesting witnesses can be called to court to give evidence on what transpired, and more specifically on whether they saw the deceased sign the document. The attesting witnesses are required, after witnessing or seeing the testator sign or make his make on the document, to also sign the document themselves, or to affix their mark. The 1984 will bears only one signature, that said to be of the testator. There is no other signature of anyone else. that would mean that the 1984 was not signed by 2 attesting witnesses as required by section 11 of the Law of Succession Act. The said will was, therefore, not attested at all, and, therefore, it was invalid. See *Rahab Nyakangu Waithanju vs. Fredrick Thuku Waithanje* [2019] eKLR (Achode J) The 1989 will bears 2 signatures. One is that of the testator, the second is of a Japheth Mahasi. It is not indicated in the document the purported capacity in which Joseph Mahasi signed the same, but I presume that he did so as an attesting witness. However, the signature of 1 witness is not adequate. Section 11 requires a minimum of 2 attesting witnesses, and that would mean that there is no compliance, and the 1989 will was not validly attested. See *HWM vs. KM* [2017] eKLR (Achode J), *In Re Estate Onesmus Ikiki Waithanwa (Deceased)*[2008] eKLR (Kasango J), *Gulzar Abdul Wais vs. Yasmin Rashid Ganatra & another* [2014] eKLR (Lesiit J), *In re Estate of Chandrakant Devchand Meghji Shah (Deceased)*[2017] eKLR (Thande J), *In the Matter of the Estate of Susan Kanini Kilonzo (Deceased)* Nairobi HCSC No. 2669 of 2002 (Koome J)(unreported), *In re Estate of Kidogo Lolmetetek Olormor (Deceased)*[2020] eKLR (Ougo J) and *In re Estate of Stephen Magembe Gwaka (Deceased)*[2019] eKLR (Majanja J).

22. The final thing that I should say about the validity of the 2 wills is that the applicants herein are the ones who initiated the succession cause herein in intestacy. They initiated the cause on 22nd July 2010, on the basis that the deceased had died intestate. Letters of administration intestate were made to them on 13th September 2010, and a grant was issued, dated 29th September 2010. At that time, they did not talk about the deceased having made 2 wills, one in 1984 and another in 1989. The issue of the existence of these wills first came up 10 years later in 2016, after the protestor and others brought applications for revocation of the 2010 grant in intestacy, complaining that they had been sidelined and excluded from the succession process. When the applicants mounted the application dated 3rd November 2016, where they sought a grant of probate, they did not disclose why they did not petition for a grant of probate of the wills on 22nd July 2010, when they first came to court in the matter of the estate of the deceased. They did not also explain when they discovered the existence of these wills, and who had custody of them all this while. The coincidence of the disclosure of these wills after other survivors of the deceased came forth to say that there was a scheme to disinherit them by the applicants suggests foul play, and that the alleged wills are a creation of the applicants to have the bulk of the estate appropriated to themselves.

23. The conclusion on these wills, therefore, is that the 2 wills are not valid, and, therefore, the deceased did not die testate. His estate is for distribution in intestacy. Having held that the 2 wills invalid, I need not address any other issue related to the said wills. I shall not have to address whether a grant of probate ought to be made instead. The administrators in office were appointed by the court, on 10th March 2016, by consent of the parties. No issues have been raised about their appointment or lack of competence on their part to administer the estate, except for the issue of the wills. I shall accordingly confirm them as such.

24. The principal purpose of confirmation of grant is distribution of the assets. The proviso to subsection (2) of section 71 requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

> "Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined."

25. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? On the first limb of the proviso, as to whether the applicants have identified all the persons beneficially entitled, I find that they have not. In the petition they only disclosed themselves and Wycliffe Keya. In their application for confirmation of grant, dated 18th June 2013, they disclosed themselves, the 2 of them, as the only survivors of the deceased, describing themselves as children of the deceased. When applications for revocation of grant were mounted, it transpired that the deceased had other families, that the applicants had not disclosed. It also transpired that not all the assets of the estate were disclosed and proposed for distribution. The administration, therefore, only catered for a section of the family of the deceased and a portion of the assets. The disclosures in the first revocation application prompted them to file a second confirmation application dated, 13th February 2014, where the survivors were revised from 3 to 9. At the oral hearing the number of members of the family of the deceased went even higher, to 3 wives and 13 children. From the material before me, it is clear that the deceased had married 3 times, and had biological children with the first 2 wives. He had no biological children with the third wife, but he had informally adopted her 3 children in terms of section 3(2) of the Law of Succession Act. The 1st wife is dead, and the deceased is, therefore, survived by 2nd and 3rd wives, being Azibeta Kusui Keya and Mary Marimba Keya. The 13 children of the deceased are Eric Muyeyia, Fred Mumera, William Wesley, Noah Mukangala, Rachael Mmboga and Phanice from the 1st house; Lazarus Chabuga, Grace Vinaywa and Mary Olesia from the

2nd house; and Anna Vugutsa, Wycliffe and Margaret Mideva from the 3rd house. the estate of the deceased shall be distributed amongst the 2 surviving spouses and 13 surviving children.

26. The other item for ascertainment, according to the proviso to section 71(2) and Rule 40(4), is the shares due to each of the surviving spouses. The matter of shares should take us to the assets of the estate. Have the administrators ascertained the assets of the estate that are available for distribution? The principal assets are Kakamega/Chekalini/557 and South Maragoli/Lugovo/1061. I have seen the certificates of official searches for these 2, dated 16th February 2010 and 18th April 2013, respectively. Kakamega/Chekalini/557 is completely free, with no encumbrances. On the other hand, South Maragoli/Lugovo/1061 is encumbered. There are charges that were registered in 1978 and 1980 against the title. The administrators have made no efforts to demonstrate whether the charges have been discharged, so as to free the property for distribution. No evidence was placed before me to show how much is still owing to the bank, and no one addressed me on efforts being made, if the moneys the subject of the charge are still owing, to clear them. South Maragoli/Lugovo/1061 is not free property that the deceased could have disposed of during his lifetime if it was still encumbered by the charges. It would mean that the said property is equally unavailable for distribution at confirmation, so long as the charges are still subsisting. It will only be available for distribution upon the charges being discharged. It is the responsibility of the administrators to have the charges discharged. They cannot ask me to distribute a property which is not available for distribution on account of those charges. I cannot purport to distribute the said property without taking into account the interests of the chargee, the National Bank of Kenya into account. As it is I am being invited to deal with it as if the bank has no interest in it at all. There was reference to 2 plots, one at Bukuga and the other at Mabanga. No documents were placed before me as evidence of the existence of these plots, in terms of documents of title or registration. There should be documentation of some sort. I will not purport to distribute assets where there is no proof of existence of the plots or their ownership by the deceased.

27. As to whether the shares that the persons identified as beneficially entitled had been ascertained, there is a contest. The applicants take the position that South Maragoli/Lugovo/1061 should devolve upon the 1st house, because that is where that house had been settled by the deceased; and that Kakamega/Chekalini/557 should be devolved upon the 2nd and 3rd houses, because the deceased had settled the 2 houses there, and that was where they had set up their homes. That sound fair enough, but the protestor does not agree, he argues that South Maragoli/Lugovo/1061 was too small, and a distribution that would lock the 1st house out of Kakamega/Chekalini/557 would be unfair. According to the certificates of official searches on record, Kakamega/Chekalini/557 is 10.5 hectares, while South Maragoli/Lugovo/1061 is 1.8 hectares. There could be merit in his argument. The distribution envisaged in Part V of the Law of Succession Act is equal amongst all the children of the deceased. Secondly, South Maragoli/Lugovo/1061 is still encumbered, and it may be futile to proceed to distribute either of the 2 assets before the encumbrance has been cleared. After all, it has not been demonstrated that the charges were created at the instance of the children in the 1st house rather than by the deceased proprietor himself. For a fair and equitable distribution, South Maragoli/Lugovo/1061 should be freed or redeemed first, so that if it is irredeemable, then the only property available for distribution would be Kakamega/Chekalini/557. The administrators ought to be clear in their minds that South Maragoli/Lugovo/1061 does not belong to the 1st house. It is a property in the estate of the deceased, registered in the name of the deceased. It is, therefore, their collective responsibility to ensure that the same is redeemed, by having the loans cleared and the charges discharged, Distribution of both South Maragoli/Lugovo/1061 and Kakamega/Chekalini/557 should happen only after that has been done.

28. The final orders, on the applications dated 13th February 2014 and 3rd November 2016, which are the foundation for the judgment herein, are as follows:

a. That I declare that the wills purportedly made by the deceased on 18th August 1984 and 17th October 1989 are invalid for want of proper execution and attestation;

b. That I declare that the survivors of the deceased are Azibeta Kusui Keya and Mary Marimba Keya, as surviving spouses, and Eric Muyeyia, Fred Mumera, William Wesley, Noah Mukangala, Rachael Mmboga and Phanice as children from the 1st house; Lazarus Chabuga, Grace Vinaywa and Mary Olesia as children from the 2nd house; and Anna Vugutsa, Wycliffe and Margaret Mideva as children from the 3rd house;

c. That I declare that there cannot be a fair and equitable distribution of the estate before the charges on South Maragoli/Lugovo/1061 are discharged, and I, therefore, find that distribution of the estate herein is premature, and the confirmation application is accordingly postponed;

d. That I direct the administrators, jointly and severally, to work on redeeming South Maragoli/Lugovo/1061 and discharging the charges, before having the matter relisted for determination of the application on distribution;

e. That I also direct the administrators to obtain and place on record documentation relating to the 2 plots that they claim the deceased owned at Bukuga and Mabanga markets;

f. That the matter shall be mentioned on a date to be obtained at the registry for compliance and further directions;

g. That each party shall bear their own costs; and

h. That any party aggrieved by the orders that I have made herein has leave of twenty-eight (28) days to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF SEPTEMBER,2021

W MUSYOKA

JUDGE